

CLERK, U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON

SEP 10 2010

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 08-63589-fra7
MARIO TUCCI,	)	
	)	
Debtor.	)	
	)	Adversary Proceeding
ALBERTO MIRANDA,	)	No. 09-6031-fra
	)	
Plaintiff,	)	
vs.	)	
	)	
MARIO TUCCI,	)	
	)	MEMORANDUM OPINION
Defendant.	)	

This Adversary Proceeding came on for trial on July 21, 2010.  
After carefully considering the testimony, exhibits and arguments of the  
parties I find for the Defendant.

I. FACTS

In January 2001, Defendant Mario Tucci began working for  
Plaintiff Alberto Miranda, who was doing business under the trade name of  
Cafeto Coffees. Except for a five month hiatus in 2003, Tucci continued  
to work for, or with, Miranda until the spring of 2007.

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1 Cafeto's business consisted primarily of roasting and packaging  
2 coffee beans for sale to various local retail coffee companies. The  
3 product was, for the most part, sold to the end users through local  
4 grocery stores.

5 In September 2003, Tucci registered with the Oregon Secretary  
6 of State a new corporation, Mario Tucci, LLC. At the same time, he  
7 continued to work for Cafeto delivering coffees to various retail  
8 outlets, including several in southern Oregon. The run to Douglas,  
9 Josephine and Jackson County outlets was referred to by the parties as  
10 the "south deliveries."

11 In March of 2004, Tucci and Miranda discussed creation of a  
12 separate business under the trade name of Caffè' Onesto (Italian for  
13 "honest coffee"). Their intention was to satisfy a "perceived customer  
14 demand for old world, Italian style coffees," and to fill a niche in the  
15 coffee trade left by the recent failure of a competitor. Tucci proceeded  
16 to register Caffè' Onesto as an assumed business name of Mario Tucci,  
17 LLC.

18 After Caffè' Onesto was established under Tucci's corporation,  
19 Tucci and Miranda agreed on various blends that Caffè' Onesto would  
20 market. Miranda and Cafeto roasted and packaged the coffee beans and  
21 delivered them to Tucci/Caffè' Onesto on account. Tucci provided  
22 virtually no capital to the enterprise, and Miranda advanced the costs of  
23 the raw beans. The parties differ sharply over the origin of the various  
24 blends created by Miranda and marketed by Tucci: Miranda claims the  
25 recipes as his own, while Tucci asserts that they were developed through  
26 a collaborative process between the two.

1 Over a time, Tucci fell behind in payments to Miranda,  
2 eventually owing him over \$13,000 on account. As Miranda stepped up his  
3 demands for payment, Tucci began searching for another product source.  
4 In March of 2007, he approached Charles Webber, who operated a local  
5 coffee roasting facility. They agreed that Webber (who subsequently  
6 incorporated his business as Wholesale Coffee, Inc.) would supply roasted  
7 and packaged beans, using the recipes previously produced by Miranda.<sup>1</sup>  
8 Soon after the relationship began, Coffee Wholesalers made changes to the  
9 blends, due to various factors. In particular, Coffee Wholesalers would  
10 substitute particular varieties, with Tucci's consent, (e.g. Nicaraguan  
11 for Columbian) in light of available inventory. Tucci testified that  
12 this practice was not uncommon, and typically did not affect the quality  
13 of the end product.

14 On October 1, 2007, Tucci and Webber agreed on the sale of  
15 Caffè' Onesto to Coffee Wholesalers for \$12,600. The assets sold  
16 included the Caffè' Onesto trade name, names and accounts maintained by  
17 Caffè' Onesto, Caffè' Onesto trademarks and trade dress. Presumably,  
18 Caffè' Onesto, under its new ownership, continued to use the same blends.

19 Miranda sued Tucci in State Court on September 5, 2007. His  
20 complaint sought damages for breach of contract, an action on account,  
21 conversion, and violation of the Oregon Trade Secrets Act. The prayer  
22 sought \$13,000 on the account, and over \$100,000 damages on the  
23 conversion and trade secrets claims. Thereafter, the parties stipulated

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24  
25 <sup>1</sup> Throughout the time in question, Caffè' Onesto marketed at least  
26 four "Italian" blends, consisting of mixtures of three or four common  
coffee varieties. For example, Caffè' Onesto's "Firenze" contained a  
blend of Columbian, Sumatran and Brazilian beans.

1 to entry of a judgment for \$13,332.54 on the account claim. The  
2 conversion and Trade Secret Act claims were dismissed without prejudice.

3       Soon after the sale of Caffè Onesto to Coffee Wholesalers,  
4 Shivan Tucci, Mario Tucci's wife, borrowed \$16,100 in order to purchase a  
5 restaurant named Latitude X Cafe. The loan called for monthly payments  
6 of principal and interest of \$742.93. After the sale of the Caffè Onesto  
7 business, the Defendant instructed Coffee Wholesalers, Inc. to make the  
8 monthly \$700 payments to his wife, Shivan Tucci, who used the payments to  
9 pay business-related expenses of Latitude 10 Café, and for other  
10 expenses. Those payments continued from October 20, 2007 through April  
11 2009.

12       Unable to pay his debts, including the debt to Miranda, Mario  
13 Tucci filed a petition for relief under Chapter 13 of the Bankruptcy Code  
14 on September 19, 2008. The schedules filed with the petition made no  
15 reference to the payments owed to him on the sale of Caffè Onesto to  
16 Coffee Wholesalers. (The schedules were filed on October 6, 2008.)  
17 Confirmation of the plan was objected to by Miranda, who pointed out  
18 various deficiencies in Tucci's schedules. In addition, the Trustee  
19 objected, citing questions he had regarding whether the \$700 monthly  
20 payment from Coffee Wholesalers was accounted for in Debtor's schedules.

21       Ultimately, confirmation was denied on two grounds:  
22 (1) insufficient evidence as to feasibility of the plan of reorganization  
23 with respect to the ability of the restaurant, upon which the Plan  
24 relied, to be consistently profitable, and (2) failure to show good faith  
25 in that Debtor could have, but did not, seek full time employment. Debtor  
26 thereafter chose to convert the case to one under Chapter 7. Schedule B,

1 filed as part of the conversion documents upon conversion to chapter 7,  
2 revealed a \$1,400 asset consisting of the assignment of right to receive  
3 the two remaining \$700 payments due the Defendant from Coffee  
4 Wholesalers, Inc.

## 5 II. NATURE OF THE ADVERSARY PROCEEDING

6 Miranda filed a complaint in this matter setting out three  
7 claims for relief:

8 1) Denial of Defendant's general discharge under Code §§  
9 727(a)(2)(A) and (B),

10 2) Exception from discharge of Plaintiff's claim against  
11 Defendant under Code §§ 523(a)(2) and (6), in the amount of \$100,332.54,  
12 and

13 3) Injunctive relief, enjoining Defendant from using the trade  
14 secrets of Plaintiff.

15 The § 727 claims are premised on Plaintiff's allegation that  
16 Defendant, with the intent to hinder, delay and defraud Plaintiff,  
17 transferred within one year of the bankruptcy petition date business  
18 property Plaintiff claims as his to the owners of Coffee Wholesalers,  
19 Inc.: trade secrets, ideas, customer lists, pricing information, coffee  
20 roasting recipes, business model, trade name and label design.

21 The § 523(a)(2) claim alleges that Defendant obtained the  
22 above-mentioned business property from Plaintiff by false pretenses and  
23 then converted and sold it to Defendant's business associates.

24 The § 523(a)(6) claim alleges that Defendant wilfully and  
25 maliciously misappropriated Plaintiff's trade secrets and converted them  
26 // // //

1 to his own purposes and economic benefit by way of the sale to Coffee  
2 Wholesalers, Inc.

3 III. DISCUSSION

4 A. 11 U.S.C. § 727(a)(2)(A) and (B):

5 (a) The court shall grant the debtor a discharge,  
6 unless -

7 \* \* \*

8 (2) the debtor, with intent to hinder, delay,  
9 or defraud a creditor or an officer of the estate  
10 charged with custody of property under this  
11 title, has transferred, removed, destroyed, mutilated,  
12 or concealed, or has permitted to be  
13 transferred, removed, destroyed, mutilated, or  
14 concealed-

15 (A) property of the debtor, within one year  
16 before the date of the filing of the petition;  
17 or

18 (B) property of the estate, after the date of  
19 the filing of the petition;

20 Plaintiff argues that the Defendant's sale of Caffè Onesto on  
21 October 1, 2007 was made with the intent to hinder, delay or defraud the  
22 Plaintiff. Defendant testified that he sold the business because he  
23 wasn't making enough money to pay his bills, including the amount he owed  
24 to the Plaintiff for purchases on account. He also testified that he  
25 considered the Caffè Onesto business to be his and that he did not need  
26 to inform Miranda of the sale or request his permission. I find the  
Defendant's testimony to be credible and in accord with other evidence  
presented. I cannot find that Plaintiff has produced sufficient evidence  
to meet his burden to prove that the sale of the Caffè Onesto business  
was made by Defendant with the intent to hinder, delay, or defraud the  
Plaintiff.

1 B. 11 U.S.C. § 523(a)(2)(A):

2 (a) A discharge under section 727, 1141, 1228(a),  
3 1228(b), or 1328(b) of this title does not discharge  
an individual debtor from any debt—

4 \* \* \*

5 (2) for money, property, services, or an extension,  
6 renewal, or refinancing of credit, to the extent  
obtained by—

7 (A) false pretenses, a false representation, or actual  
8 fraud, other than a statement respecting the debtor's  
or an insider's financial condition;

9 In order to prove fraud under § 523(a)(2)(A), a creditor must  
10 prove by a preponderance of the evidence the following five elements:

11 (1) the debtor made a material misrepresentation, (2) with knowledge of  
12 its falsity, (3) with the intent to deceive, (4) on which the creditor  
13 justifiably relied, and (5) due to which the creditor sustained loss or  
14 damage. In re Kirsh, 973 F.2d 1454, 1457 (9th Cir. 1992).

15 In order for Plaintiff to succeed in proving the first three  
16 elements of this claim, he must show that Defendant obtained the "money,  
17 property, or services" of Plaintiff with the intent, at the time that  
18 such was received, to appropriate that money, property, or services to  
19 his own use and benefit.

20 No credible evidence was presented at trial that the "trade  
21 secrets, ideas, customer lists, pricing information, coffee roasting  
22 recipes, business model, trade name and label design" of Caffè' Onesto,  
23 which Plaintiff claims were his, were acquired by Defendant, knowing that  
24 the property belonged to Plaintiff, and with the intention of depriving  
25 Plaintiff of the benefit of his property. In fact, the evidence shows  
26 that there may have been a collaboration between the Plaintiff and

1 Defendant which resulted in Defendant creating his business and  
2 registering his business organization. While the Plaintiff may have  
3 provided his ideas as to types of coffee blends Tucci should sell,  
4 possible customers, etc., the Defendant testified that he created the  
5 business name, coffee blends, logos and other accouterments of his  
6 business. There was no partnership created - Plaintiff and Defendant did  
7 not share in the profit and loss of Caffè' Onesto. The relationship  
8 between the two became one of vendor and customer. Defendant stopped  
9 buying roasted beans from Plaintiff when, according to Defendant,  
10 Defendant became generally dissatisfied with the quality of the product  
11 provided and Plaintiff continued to make unauthorized substitutions which  
12 changed the taste of the coffee roasts and cost the Defendant customers.  
13 There is no evidence of intent on Defendant's part at the beginning of  
14 the relationship to take anything belonging to Plaintiff to the  
15 Plaintiff's detriment.

16 Nor was credible evidence presented that Defendant purchased  
17 roasted coffee from Plaintiff with the intent not to pay him. Testimony  
18 was given that Defendant started to fall behind on his payments to  
19 Plaintiff and Plaintiff chose to advance product on credit. The evidence  
20 shows that Defendant intended to pay Plaintiff for the product he  
21 received, and did make payments on the debt, but became financially  
22 unable to do so.

23 C. 11 U.S.C. § 523(a)(6):

24 Section 523(a)(6) bars discharge of a debt "for willful and  
25 malicious injury by the debtor to another entity or to the property of  
26 another entity." The "willful" element requires proof that the debtor



1 either intended that the injury occur or that he had the subjective  
2 belief that injury was substantially certain to occur as a result of his  
3 conduct. The "malicious" injury element requires "(1) a wrongful act,  
4 (2) done intentionally, (3) which necessarily causes injury, and (4) is  
5 done without just cause or excuse." In re Su, 259 B.R. 909, 912-14 (9th  
6 Cir. BAP 2001) (citing Petralia v. Jercich, 238 F.3d 1202 (9th Cir.  
7 2001)), aff'd, 290 F.3d 1140 (9th Cir. 2002).

8 Plaintiff's claim essentially alleges that Defendant converted  
9 Plaintiff's trade secrets regarding coffee blends. First, it does not  
10 appear from the evidence presented that any trade secrets existed to  
11 convert. Miranda testified that it was not the "practice" in the coffee  
12 business to copyright blends. Tucci testified that he created the  
13 initial blends he used himself, or in collaboration with Miranda, and had  
14 Miranda roast and blend the beans for him. Some of what Tucci knew of  
15 the coffee trade was undoubtedly learned when he worked for Miranda, but  
16 there is no evidence that Tucci was required to sign any agreement  
17 protecting trade secrets either during his employment with Miranda or  
18 later when Tucci created the Caffè Onesto business. Miranda noted that  
19 his knowledge of the blends grew over years of contact with various  
20 people in the coffee business. It is just as likely that Tucci's  
21 knowledge of blends was acquired the same way.

22 Finally, there is no evidence of damages relating to the  
23 alleged conversion of trade secrets. The only evidence presented was an  
24 exhibit presented by Miranda demonstrating how much Tucci had purchased  
25 from him over the course of a year. This does not translate into damages  
26 for loss of trade secrets. It does not, for instance, show loss of

1 profit to Miranda's business related to Tucci's use of Miranda's trade  
2 secrets.


3 Because there is insufficient evidence that legally protected  
4 trade secrets belonging to Miranda were taken by Tucci or that Miranda  
5 was injured in some way, the Plaintiff's claim under § 523(a)(6) fails.

6 D. Equitable Relief:

7 As discussed earlier, while it appears that Miranda may have  
8 provided some suggestions when Tucci initially set up his Caffe' Onesto  
9 business, it does not appear, or at least it has not been proven  
10 sufficiently, that Tucci obtained or used any trade secrets belonging to  
11 Miranda that he could be compelled to desist from using. Absent a  
12 finding that Defendant had commercial trade secrets and that Defendant  
13 obtained those trade secrets from Plaintiff with the clear understanding  
14 that the disclosure was made in confidence, there can be no injunctive  
15 relief enjoining their use. See e.g. Incase, Inc. v. Timex Corp., 488  
16 F.3d 46 (1st Cir. 2007).

17 IV. CONCLUSION

18 For the reasons given, judgment will be entered by the Court  
19 for Defendant dismissing Plaintiff's claims. The Memorandum Opinion sets  
20 out the Court's Findings of Fact and Conclusions of Law.

21  
22   
23 FRANK R. ALLEY, III  
24 Bankruptcy Judge  
25  
26